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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Consider the
Adoption of a General Order and Procedures
to Implement the Digital Infrastructure and
Video Competition Act of 2006.

R.06-10-005

OPENING COMMENTS

OF SUREWEST TELEVIDEO (U 6324 C)

ON PROPOSED DECISION MAILED AUGUST 24, 2007

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I. INTRODUCTION.

Pursuant to Rule 14.3(a) of the Commission's Rules of Practice and Procedure, SureWest TeleVideo ("STV") provides the following opening comments on the Proposed Decision of Commissioner Chong mailed on August 24, 2007 ("PD"). The PD addresses Phase II issues relative to the implementation of the Digital Infrastructure and Video Competition Act of 2006 ("DIVCA").

The PD disregards the law and legislative intent that smaller providers of video services should have less demanding, more flexible build-out requirements than larger providers of video services. By ignoring the law and legislative intent, the PD not only applies the same build-out requirements to smaller providers that would apply to larger providers, it also creates an onerous, overly-regulatory prior approval application process nowhere contemplated in DIVCA for smaller providers that do not expect to meet the build-out safe-harbors.

The Legislature had numerous public discussions on the issue of build-out requirements for smaller, regional providers, and specifically cited SureWest Communications as a model of both an overbuilder competing outside its incumbent telephone service area, and as a small incumbent telephone company expanding into video to compete in its telephone service area. At no time during the hearings on AB 2987 in the Legislature was a build-out model similar to that of the large, facilities-based incumbents Verizon and AT&T contemplated for smaller providers like STV, as the Legislature was cognizant of the significant economic disadvantages faced by a small video competitor. The concept of prior approval for build-out for smaller video providers was never accepted by the Legislature.

The fundamental mistake in the PD is that it assumes the Commission must operate no differently in its oversight of video service providers than it does in its role as a regulator of public utilities. If the PD would recognize the difference in approaches, it would follow that

build-out prior-approval requirements have no place in the Commission's video service oversight. What the Legislature intended was to provide more incentive for regional competition through the new state franchising process than had been provided under the outdated local franchise process. The Legislature specifically recognized that existing competitive video providers, such as STV, provide the most vibrant form of regional competition in the video market by taking on incumbents while operating under unfavorable existing franchises. The new state franchise model was intended to encourage entry in the video market, and in so doing, to ensure that smaller providers did not have to meet the same build-out requirements as the large, facilities-based telephone corporations. Sections 5890(c) and (d) specifically separated out small video providers offering service in incumbent telephone areas, and small video providers offering service as overbuilders outside their ILEC service areas. The PD negates these much discussed policy considerations and distinctions in applying the large video provider safe harbor standards to small video providers.

The PD compounds the error in its approach to oversight of smaller video providers by applying the low-income build-out provisions that were clearly intended only for larger providers of video service. *See* Public Utilities Code Section 5890(b). Given the geographic and demographic differences between larger and smaller video providers, applying the low-income build-out requirements in Section 5890(b) to smaller video providers is unworkable, setting the stage for possibly ludicrous build-out decisions clearly not contemplated by the Legislature.

Prior to adopting the PD, the Commission should modify the PD to adopt appropriate safe harbors for smaller video providers, to eliminate any prior-approval requirements for smaller video provider build-out and to delete any reference to low-income build-out

requirements for smaller video providers to comport with the clear legislative intent and statutory guidance of Sections 5890(c) and (d).

II. THE COMMISSION SHOULD ELIMINATE THE SEPARATE BUILD-OUT APPLICATION FOR SMALLER VIDEO PROVIDERS

The PD's interpretation of DIVCA is wholly at odds with the Legislature's intent to create a more flexible approach to video franchise processes. Instead of the simple, discretion-less application process to be completed within 44 days,¹ the PD embraces the approach that would require a smaller video provider to submit a detailed build-out application in the event it believes it cannot satisfy the safe harbor build-out requirements applicable to smaller video providers. *See* PD, Ordering Paragraph 2.a. Possibly prior to offering video service and in any event no later than the conclusion of the calendar year in which the franchise is requested, the PD unreasonably expects that a smaller video provider will be able to provide a detailed showing of how it intends to build out in its service area, including the demonstration of a "serious and realistic planning effort," and the identification of those areas that are substantially higher cost to serve. This approach to oversight of small video providers is objectionable for several reasons.

First, the requirement to file a supplement to the franchise application contradicts Section 5840(b). In Section 5840(b), the Legislature, perhaps concerned the Commission might undertake exactly what is contemplated by the PD, expressly delimited the scope of the application process for a state-issued video franchise. Specifically, the Commission may not exceed the provisions set forth in Section 5840 when establishing its video franchise application process. However, nowhere in Section 5840 is the Commission authorized to require smaller providers to make detailed build-out showings as part of the application process. Furthermore,

¹ *See* Cal. Public Util. Code § 5840.

the PD never addresses what happens after such a build-out application is filed. Is a smaller provider prohibited from serving customers until such application is granted? Will the Commission act in a timely manner on such an application, or must a smaller provider endure months of uncertainty while the Commission ponders what will undoubtedly constitute only a forecast of build-out plans. Furthermore, requiring an application process and its resultant proceeding are an expensive proposition for small companies. One of the main intents behind adopting DIVCA was to reduce the costs of entering video markets. A detailed application process flies in the face of this relief and would likely increase the cost of acquiring a franchise license as compared to the local franchise process. The administrative burden and uncertainty associated with the application process that are predictable by-products of the PD are completely contrary to the spirit of DIVCA and should be eliminated.

Second, the PD does not address how its calendar year filing requirement can be reconciled with Section 5890(f)(1). That section contemplates a provider will have two full years to evaluate its build-out progress before returning to the Commission if it needs additional time. Under the PD, a smaller provider would have to make a filing in less than a year. In fact, if a smaller provider files a request for a state franchise in December, the calendar year filing requirement would also mean that it will have to file its build-out application with the Commission basically at the same time in order to meet the calendar year requirement. The PD fails to reconcile why larger providers should be granted more time than smaller providers to evaluate the progress of their build-out.

Finally, the PD's framework ignores the fundamentally different standards applied to smaller providers as compared to larger providers. The Legislature outlined that smaller providers should have separate and less burdensome build-out requirements than larger

providers, recognizing the economic realities faced by smaller providers. The Legislature also recognized that smaller providers were the key to competition and that they benefit consumers in secondary markets. The PD would ignore this intent and thwart competition by applying large provider build-out requirements to smaller providers.

To correct this situation, the Commission should revise the PD to recognize the differences between smaller and larger providers contemplated by the Legislature. STV recognizes that its prior suggestion that smaller provider safe harbors should be twice those of the larger provider standards may have seemed too long. However, the Commission should still consider STV's approach, which recognizes legislative intent to provide more flexible build-out for smaller providers, but apply it on a more limited basis by adding one to two years to the build-out requirements identified in Section 5890(e) and using those extended build-out standards as the safe harbors contemplated in Section VI.B.1.(2) of General Order 169. The Commission should also delete Section VI.B.1.(3) of General Order 169; if a smaller provider cannot meet the safe harbors in Section VI.B.1.(2), then it should be permitted to pursue the extension of time contemplated in Section 5890(f)(1). STV's proposal is logical, consistent with the structure adopted for the larger companies and consistent with legislative intent, which was to provide additional time for smaller company build-outs. Finally, the Commission should not require smaller providers to demonstrate proactively that their build-out comports with the high cost exception in Section 5890(c), but instead leave that determination to enforcement actions or complaint proceedings by local jurisdictions.

III. THERE IS NO STATUTORY BASIS OR REASONABLE JUSTIFICATION FOR APPLYING THE LOW-INCOME PENETRATION QUOTAS IN SECTION 5890(b) TO SMALLER VIDEO PROVIDERS.

The PD's proposal to apply specific low-income customer penetration percentages to small video providers constitutes legal error. Section 5890(b) prescribes specific low-income penetration requirements for video franchise holders with more than one million telephone customers. As discussed in STV's comments in Phase II, Section 5890(b) embodies a negotiated compromise between the large ILECs and the Legislature, under which AT&T and Verizon agreed that their respective video footprints would be comprised of at least 25% low-income households within three years, and at least 30% low-income households within five years. The Legislature adopted no such requirement for smaller providers, recognizing that most operate in discreet regional areas with demographics that might differ from statewide breakdowns. The PD should be revised to remove the unlawful extension of the 25% and 30% low-income penetration benchmarks in Section 5890(b) to smaller providers.

The PD's establishment of low-income penetration quotas for smaller providers is inconsistent with both the language and the intent of DIVCA. In construing a statute, the Commission must consider the "context of the statute as a whole and the overall statutory scheme." *Smith v. Superior Court*, 39 Cal.4th 77, 83 (2006). DIVCA must be interpreted in a manner that gives "significance to every word, phrase, sentence, and part [of the statute] in pursuance of the legislative purpose." *Id.* The PD's low-income penetration requirements violate the "cardinal rule of statutory construction" that interpreting bodies "must not add provisions to statutes." *People v. Guzman*, 35 Cal.4th 577, 587 (2005); *see also* Cal. Code Civ. Proc. § 1858 (in interpreting a statute, a court or administrative agency is bound "not to insert what has been omitted, or to omit what has been inserted.")

Nothing in Section 5890 or any other part of the statute supports the application of the 25% and 30% thresholds to smaller providers. The PD's departure from the statute is contrary to the principles of statutory construction that bind the Commission. If the Legislature had intended smaller video providers to be subject to the exact same requirements as the large providers, it would not have limited Section 5890(b) to "holders or their affiliates with more than 1,000,000 telephone customers." *See* Public Utilities Code Section 5890(b). The Legislature very easily could have written the statute without the 1,000,000 customer threshold, but it was included as an acknowledgment of market and economic realities that impact the ability of smaller providers to compete and of the benefit smaller providers bring to consumers, especially in smaller markets. If the Legislature had intended to apply the low-income penetration quotas to all providers, it also could have conflated the general non-discrimination provisions in Section 5890(a) with the specific provisions in Section 5890(b). Yet another construction of the DIVCA non-discrimination requirements would have been to grant authority to the Commission to adopt low-income penetration rules for smaller providers. The Legislature pursued none of the approaches that would have supported the low-income requirements in the PD.

The structure and broader context of DIVCA provide further testament to the impropriety of the PD's low-income requirements. The language of DIVCA was carefully crafted to reflect the series of negotiated compromises that gave rise to the legislation. As the Commission and many of the interested parties have emphasized, DIVCA is a narrowly-tailored statute under which the Commission has specifically-enumerated authority. In D.07-03-014, the Commission acknowledged that its role in the video franchising process is "a limited one," and that the Commission "may not impose any requirement on any holder of a state franchise except as expressly provided by . . . the Act." D.07-03-014, *mimeo*, at p. 3 (citing Pub. Util. Code §

5840(a)). Although the Commission has authority under Public Utilities Code Section 5890 to ensure that video build-out occurs in a reasonable and non-discriminatory manner, the Commission must wield this authority consistent with the specific provisions in Section 5890.

The legislative history underlying DIVCA further demonstrates that the specific low-income quotas in Section 5890(b) were never intended to apply to smaller providers. The August 28, 2006 Senate Analysis of the draft legislation states that the "authors [of DIVCA] have negotiated build-out commitments from each of the largest two telecommunications companies." *See* August 28, 2006 Senate Analysis, Page 4.² The August 28, 2006 Senate Analysis of the final amended version of DIVCA, which included amendments on 8/23/06 and 8/28/06 specific to providers with less than 1,000,000 customers and specific to overbuilders versus telephone corporations providing video in their telephone service areas, addresses only build-out and anti-discrimination requirements for AT&T and Verizon. Specifically, the Senate Analysis states that an overlapping build out requirement "has not been applied to new competitors under this bill, except under limited circumstances." The Senate Analysis also states that Verizon has to offer video service to 25% of customers within two years and 40% of customers within five years, and 35% within three years and 50% within five years for AT&T.

The Senate Analysis further addresses anti-discrimination with regard to low income customers only in the context of AT&T and Verizon, both of which were deemed to have telephone service areas large enough to support potential discriminatory build outs. "This bill again goes beyond other state and federal franchising proposals by establishing a specific test for

² The August 28, 2006 Senate Analysis is available at the following link:
http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_2951-3000/ab_2987_cfa_20060828_211945_sen_floor.html.

ensuring that discrimination is not occurring **for the two largest telephone companies in California.**" *Id.* (emphasis added.) The Legislature considered the economics of smaller provider operations versus those of the two largest companies in the state (and in the country), and determined no additional anti-discrimination requirements were necessary for smaller providers. In addition to deviating from statutory intent, the PD's low-income requirements raise technical problems that could cause significant competitive disadvantages for smaller providers in rolling out video service pursuant to state-issued franchises. While the 25% and 30% benchmarks may be appropriate for mega-corporations like Verizon and AT&T, they make little sense for providers with small customer bases and relatively small geographic serving areas (at least compared to Verizon and AT&T). While the large ILECs have sufficient numbers of telephone customers to approximate the distribution of incomes in the state generally, this may not be true in smaller provider territories.

Under the PD's approach, a smaller provider whose customer base includes only 10% low-income households would have to make a specific showing that its build-out includes at least 10% low-income individuals. With a smaller population in the overall service area, smaller providers implementing such a requirement can experience perverse results. For example, consider a smaller provider with 1000 households, 100 of whom qualify as "low-income." If this smaller provider builds out to 80% of its households, it must show that its footprint includes at least 80 low-income households. Unlike in the Verizon or AT&T service areas, these 80 low-income households may bear no geographic relation to each other. That is, there may be no particular area where the provider could build to sweep in all of these 80 households. There may be no systematic way for the smaller provider to ensure that it meets the low-income requirement. Companies facing these circumstances may be forced to undertake the significant

cost of specifically targeting a very small number of geographically-dispersed low-income households in a manner that deviates from a rational build-out. The PD seems to acknowledge the problem with applying this requirement to smaller providers, but it fails to propose an adequate solution.

Rather than imposing a low-income penetration quota on smaller providers that was never intended for them, the Commission should follow the law and simply rely on the general non-discrimination standard in Public Utilities Code Section 5890(a). Under the reporting requirements of Section VII(C)(4)(1) of G.O. 169, the Commission will be collecting information about all providers' build-out relative to low-income households. To the extent that an instance of discrimination arises that requires Commission intervention, the Commission is well-positioned to learn of it, and address it. Consumer complaints or complaints from local jurisdictions are other avenues through which true violations of the non-discrimination standard could come to light. Given that the Commission has these vehicles for addressing non-discrimination, the approach in the PD is unnecessary and contrary to the law. When the costs and uncertainties of the quota approach for smaller providers are considered, it is clear that applying these low-income requirements to providers with less than one million telephone customers is inconsistent with DIVCA's objectives to encourage the entry of smaller providers into the video market. For all of these reasons, the specific low-income quota requirements for smaller providers must be removed from the PD.

IV. CONCLUSION.

Based on the foregoing, the Commission should eliminate the build-out application requirement embraced by the PD and reflected in Section VI.B.1.(3) of General Order 169. The Commission should also set safe harbor build-out benchmarks for smaller providers at one to two

years longer than those found in Section 5890(e). Finally, the Commission should not apply the Section 5890(b) requirements to smaller providers.

Dated this 13th day of September, 2007, at San Francisco, California.

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CERTIFICATE OF SERVICE

I, Noel Gielegthem, declare:

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is COOPER, WHITE & COOPER LLP, 201 California Street, 17th Floor, San Francisco, CA 94111.

On September 13, 2007, I served the

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OF SUREWEST TELEVIDEO (U 6324 C)

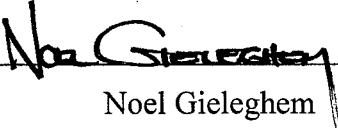
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Hard copies were served via U.S. Mail on the two parties on the service list who did not provide an e-mail address. Hard copies were also mailed Assigned ALJ Kotz and to Jane Whang, Advisor to Assigned Commissioner Chong.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 13, 2007, at San Francisco, California.



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